

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MICHAEL JOHN TARIO,

Appellant,

v.

DEPARTMENT OF ECOLOGY, and
JOSEPH BALDWIN,

Respondents.

PCHB NO. 05-091

ORDER GRANTING SUMMARY
JUDGMENT

This matter comes before the Pollution Control Hearings Board on summary judgment motions from the Respondent Washington State Department of Ecology (Ecology), seeking dismissal on two of the three issues in the case, and from Respondent Joseph Baldwin (Baldwin) seeking dismissal of the remaining issue.

The Board was comprised of William H. Lynch, Chair, and Kathleen D. Mix.¹ Administrative Appeals Judge, Kay M. Brown presided for the Board. Michael John Tario, Attorney, represented himself. Phillip A. Serka, Attorney, appeared for Respondent Baldwin. Sarah Bendersky, Assistant Attorney General, appeared for Respondent Ecology.

The Board reviewed and considered the following pleadings, which were submitted by the parties:

1. Notice of Appeal of Variance with attachment;

¹The third position on the Board is currently vacant.

2. Ecology's Motion for Partial Summary Judgment, Memorandum in Support of Motion, Declaration of Sarah Bendersky in Support of Motion with attached Exhibits 1 and 2;
3. Baldwin's Motion for Summary Judgment with attached Exhibit A, Declaration of Joseph D. Baldwin with attached Exhibits A through K; Declaration of Peter Willing, Ph.D., with attached Exhibits A through C, and Declaration of Trevor Contreras with attached Exhibit A;
4. Tario's Response to Baldwin and Ecology's Motions;
5. Ecology's Reply to Tario's Response and Declaration of Bendersky in Support of Reply with attached Exhibits 1 through 3;
6. Baldwin's Reply to Tario's Response;
7. Tario's Response to Ecology's Reply to Tario's Response to Ecology's Motion for Partial Summary Judgment and Declaration of Michael J. Tario; and,
8. Ecology's Motion to Strike Tario's Response, Memorandum in Support, and Declaration of Sarah Bendersky.

Having fully considered the record in this case and being fully advised, the Board enters the following ruling.

PRELIMINARY MATTERS

During the briefing on the summary judgment motions, the parties filed three² procedural motions. The analysis and rulings on each of these motions follows.

A. Motion by Tario to Strike Baldwin's Exhibits B, C, D, E and F

In support of his summary judgment motion, Baldwin filed several exhibits. Appellant Michael John Tario (Tario) objects to Exhibits B through F, attached to Joseph Baldwin's declaration, and asks that they be stricken from the record. The challenged exhibits are letters,

² Ecology's request to disregard Tario's first response brief is in effect a motion to strike the response brief.

1 sent between the Tarios and the Baldwins, regarding the possible purchase of the Baldwin's lot.

2 Tario objects to the inclusion of these letters on the ground that they are "offers of compromise."

3 While offers to compromise a claim are not admissible to prove liability for or invalidity
4 of the claim, this prohibition does not operate to exclude the challenged letter. *See* ER 408

5 (Evidence of an offer to compromise a claim is inadmissible to prove liability or lack thereof.)

6 The issue in this appeal is whether Ecology correctly issued a variance to Mr. Baldwin. That
7 was not the subject of the negotiations disclosed in Exhibits B through F. Therefore, Mr. Tario's
8 ER 408 objection is not well taken.

9 The Board does, however, find the exhibits objectionable because they are not relevant to
10 this appeal. *See* ER 401 ("Relevant evidence" means evidence having any tendency to make the
11 existence of any fact that is of consequence to the determination of the action more probable or
12 less probable than it would be without the evidence). Whether or not Mr. Tario wants to
13 purchase Mr. Baldwin's property does not make the existence of any fact relevant to Ecology's
14 decision to grant Mr. Baldwin a variance more or less likely.

15 Further, even if some marginal connection can be made between Mr. Tario's interest in
16 purchasing the property, and his challenge to Ecology's decision on the variance, the Board
17 concludes that the letters contain prejudicial material that substantially outweighs their probative
18 value, and therefore should be excluded. *See* ER 403 (relevant evidence may be excluded if its
19 probative value is substantially outweighed by the danger of unfair prejudice). Therefore,

1 Tario's motion to strike is granted, and Exhibits B through F are stricken from the record on
2 summary judgment.

3 B. Motions by Ecology to Strike Tario's Two Response Briefs

4 Ecology asks the Board to "disregard" Tario's first response³ to Ecology's motion for
5 summary judgment because it was untimely. Despite the caption of this pleading,⁴ the Board
6 concludes that the pleading is responsive primarily, if not exclusively, to Baldwin's motion.
7 Since Baldwin has not asked that Tario's response brief be disregarded, Tario's first response
8 brief will remain in the record and be considered in response to Baldwin's motion.⁵

9 Following Ecology's request to "disregard" Tario's first response as untimely Tario filed
10 another brief.⁶ Ecology filed a motion to strike Tario's second brief because it constitutes an
11 unauthorized response to a reply brief. Although this pleading is also confusingly captioned,⁷ in
12 substance it is a response to Ecology's request to disregard Tario's response as untimely. As
13 such, it constitutes an allowable response, and therefore the Board denies Ecology's motion to
14 strike Tario's second brief.

17 ³ Tario's first brief was filed at the Board on November 28, 2005.

18 ⁴ The pleading is misleadingly captioned "Appellant Tario's Response to Respondent Baldwin's Motion for
Summary Judgment and Department of Ecology's Motion for Partial Summary Judgment." (Emphasis added).

19 ⁵ Baldwin's motion was served by mail on November 7, 2005, but not filed at the Board until November 16, 2005.
The pre-hearing order in the case requires responses to summary judgment motions to be filed within 14 days of
receipt of the motion. The record is devoid of information regarding when Tario received Baldwin's motion.

20 ⁶ Tario's second brief was filed at the Board on December 12, 2005.

21 ⁷ This second brief was captioned "Appellant Tario's Response to Respondent State of Washington Department of
Ecology's Reply to Appellant Tario's Response to Respondent Ecology' Motion for Partial Summary Judgment."

1 FACTUAL BACKGROUND

2 The Baldwins acquired a vacant lot on Northshore Drive in Bellingham on August 12,
3 2004. The lot had a drain field and septic tank that had been installed in the 1970's, but never
4 used. The drain field received an approval by the Health Department as an "as-built system" on
5 March 4, 2004. *Declaration of Baldwin and Notice of Appeal of Variance.*

6 The Baldwins wanted to drill a well on the property. Due to the narrowness of the lot and
7 the placement of the drain field, there was no place on the lot that the well could be located that
8 would be 100 feet from the existing drainfield. Because Ecology's regulations required a 100-
9 foot setback from the edge of a septic system drain field for a domestic water well, the Baldwins
10 applied to Ecology for a variance from the 100-foot requirement. *Declaration of Baldwin and*
11 *Ex. G.*

12 During the process of obtaining a variance, the Baldwins hired Peter Willing, a hydro
13 geologist, to examine the site. Mr. Willing was asked to render a professional opinion as to
14 whether reducing the standard 100-foot setback from a septic system drainfield on this site would
15 pose a danger of contamination of a well constructed at the location proposed by the Baldwins.
16 Mr. Willing researched existing well logs in the area, visited the site, looked at the surveyor's
17 site map, and spoke to Lee Phipps of the County Health Department. *Declaration of Baldwin,*
18 *Willing and attached Exs. A through C.*

19 Mr. Willing concluded that a properly constructed well at the proposed location would
20 not be a risk for contamination from the existing drainfield. Mr. Willing noted that the proposed

1 location for the well was 75 feet from the edge of the Baldwin's drainfield, was not closer than
2 100 feet to any neighbors drainfield, and was 25 feet higher in elevation than the edge of the
3 drainfield. He also concluded the water table for the proposed well was approximately 60 feet
4 below ground surface, and that neighboring well logs showed over 30 feet of low permeable
5 materials below the grounds surface. *Declaration of Willing and attached Exs. A through C.*

6 Mr. Willing was also asked to consider questions raised by Ecology about the
7 groundwater gradient on the site. Ecology's concern was based on an indication on the 2002
8 Geological Map of Washington- Northwest Quadrant, J.D. Dragovich et al, Washington Division
9 of Geology and Earth Resources Geologic Map GM-50, that there is a synclinal fold in the
10 general area of the Baldwin's site that could lead one to infer a northerly dip in the bedding
11 plane. This could mean that the groundwater gradient on the site would be opposite to the
12 topographic gradient, thus resulting in water from the drainfield running toward, as opposed to
13 away from, the proposed well site. *Declaration of Willing and attached Exs. A through C,*
14 *Notice of Appeal of Variance.*

15 In response to this query, Mr. Willing talked to the Ecology well drilling coordinator,
16 Trevor Contreras. He also made a second geologic reconnaissance of the area. Mr. Willing
17 noted that the map Ecology reviewed did not show detail in the bedrock structure close to the
18 Baldwin site. In his opinion, due to the complex structure of the bedrock and the fact that it
19 changes over short distances, the map information regarding the synclinal fold cannot be used to
20 confidently extrapolate information to the Baldwin cite. Based on this analysis, and additional

1 information he gained from his site visit, Mr. Willing reaffirmed his opinion that a properly
2 constructed well would not be at risk of contamination from the Baldwins or any existing
3 drainfield. *Declaration of Willing and attached Exs. A through C, Notice of Appeal of Variance.*

4 The Baldwins also hired B&C Well Drilling & Pump Service, Inc. (B&C), to provide an
5 opinion on how to mitigate the potential impacts of siting a well closer than 100 feet to an
6 existing drainfield. B&C suggested two methods of mitigation, one of which was to provide a
7 continuous seal to the water bearing zone. *Declaration of Baldwin and Ex. J.*

8 Ecology employee Trevor Contreras, acting under the supervision of Jerry Liszak,
9 Licensed Hydrogeologist, reviewed the Baldwin's variance application, the reports from Peter
10 Willing, the recommendation from B&C, and topographic maps of the site and surrounding area.
11 He also visited the site. Based on this information, Ecology granted the variance allowing the
12 well to be located 75 horizontal feet and 25 vertical feet (uphill) from the drainfield. The
13 variance included a condition requiring the well to be sealed from the water bearing zone up to
14 the bottom of the 18-foot surface seal. The seal is to be created by pumping bentonite grout in
15 the area between the liner and the borehole. *Declaration of Contreras and Ex. A.*

16 Michael Tario, an adjacent landowner, appealed Ecology's decision to grant the variance
17 to this Board. At the pre-hearing conference on Tario's appeal, three issues were identified.
18 Those issues are:

- 19 1. Whether under WAC 173-160-106, Ecology properly granted the May 19, 2005
20 variance from WAC 173-160-171(3)?
- 21 2.a) Whether the PCHB has jurisdiction over Whatcom County decisions?

2.b) If the PCHB does have jurisdiction, whether the “Septic System” on Parcel No. 380432205362 constitutes a valid septic system as referenced in WAC 173-160-171(3)(a)(i)?

3.a) Whether the PCHB has authority to decide the constitutional issues presented in issue 3 b?

3.b) Whether the procedures and policies followed and applied to grant the variance on the subject matter property, which provided no notice or opportunity to be heard prior to the granting of the variance violated due process, fundamental fairness, and reasonable notice pursuant to law and pursuant to constitutions of the State of Washington and the United States of America?

Baldwin has moved for summary judgment on issue number one. Ecology has moved for summary judgment on issues two and three.

ANALYSIS

A. Summary judgment standard

I.

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party moving for summary judgment must show there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider the material facts and all reasonable inferences therefrom in the light most favorable to the

1 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If
2 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
3 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
4 showing sufficient to establish the existence of an element essential to that party's case, and on
5 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
6 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

7 II.

8 Here, the Board concludes there are no disputed issues of fact, and therefore this matter
9 can be decided on summary judgment.

10 B. Board's jurisdiction over Whatcom County septic system decisions (Issues 2(a) and (b))

11 III.

12 Issue 2(b) involves a challenge to the validity of the septic system on the Baldwin's lot.
13 The decision to approve the septic system was made by Whatcom County. The Pollution
14 Control Hearings Board has only the jurisdiction granted to it by the Legislature. *City of Seattle*
15 *v. Ecology*, 37 Wn. App. 819, 823, 683 P. 2d 244 (1984). This jurisdiction is outlined in RCW
16 43.21B.110(1). It does not include the jurisdiction to review County decisions regarding
17 approval of septic systems. Therefore, determination of Issue 2(b) is beyond the jurisdiction of
18 this Board.

1 IV.

2 C. Board's jurisdiction over constitutional issues (Issues 3(a) and (b))

3 Issue 3(b) involves a challenge to the constitutionality of the procedures and policies that
4 Ecology follows to grant a variance. As stated above, the Board has only the jurisdiction
5 granted to it by the Legislature. *City of Seattle* at 823. The Board's enabling statute, RCW
6 43.21B, does not expressly grant it the authority to hear a facial constitutional challenge to a
7 statute. Furthermore, RCW 34.05.570(3)(a) grants the courts the authority on judicial review of
8 agency decisions to determine constitutional challenges arising from agency actions. This
9 statutory grant of authority to the courts within the Administrative Procedures Act, chapter 34.05
10 RCW, precludes a determination that the Board has authority to determine constitutional issues.
11 *Moore v. Ecology*, PCHB No. 02-207 (Corrected Order Granting Summary Judgment)(April 14,
12 2003).

13 V.

14 The Board itself has consistently held it does not have authority to consider a facial
15 constitutional challenge to a statute or regulation. *Longview Fibre Co. v. Ecology*, PCHB No.
16 94-277 (1995)(CL V). In discussing a case involving a constitutional challenge and whether it
17 was necessary to exhaust administrative remedies, the Washington Supreme Court stated, "An
18 administrative tribunal is without authority to determine the constitutionality of a statute, and,
19 therefore, there is no administrative remedy to exhaust." *Yakima Clean Air Authority v.*
20 *Glascom Builders*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975). This Board lacks jurisdiction over

1 the constitutional issues raised by Tario. Therefore, determination of Issue 3(b) is beyond the
2 Board's jurisdiction.

3 D. Ecology's approval of the variance (Issue 1)

4 VI.

5 Department of Ecology's rules provide that a water well should not be located closer than
6 100 hundred feet to the edge of a drainfield. WAC 173-160-171(3)(b)(iv). When strict
7 compliance with this requirement is impractical, a process is set out by rule to allow a person to
8 request a variance from Ecology. WAC 173-160-106. The rule requires the applicant for the
9 variance to propose in writing:

10 a comparable alternative specification that will provide equal or greater human health and
11 resource protection than the minimum standards.

12 WAC 173-160-106(1).

13 VII.

14 Baldwin made a request for a variance pursuant to the process set out in WAC 173-160-
15 106. After reviewing the initial material submitted by Baldwin, asking for and receiving
16 additional follow up material, and conducting a site visit, Ecology determined Baldwin's request
17 met the requirements of the rule and issued a variance. Tario, in his appeal, contends the
18 approval does not meet the requirements of the rule.

19 VIII.

20 Baldwin has moved for summary judgment on this issue. Along with his motion,
21 Baldwin has filed substantial factual material. It includes Baldwin's own sworn statement that

1 due to the narrowness of the lot and the location of the existing drainfield, the well cannot be
2 located 100 feet from the edge of the drainfield. The factual material submitted also includes the
3 expert opinions of a private hydrogeologist and Ecology's well drilling coordinator that
4 Baldwin's proposed alternative to the 100-foot setback (a setback of 75 feet with an elevation
5 difference of 25 feet, combined with the sealing of the well from the water bearing zone up to the
6 bottom of the 18-foot surface seal) provides equal or greater protection for the Baldwin's
7 proposed well. Baldwin has met his initial burden as the moving party on summary judgment to
8 show that no genuine issues of material fact exist and that he is entitled to judgment as a matter
9 of law.

10 IX.

11 The burden of proof then shifts to Tario, as the responding party and the party with the
12 burden of proof at hearing, to make a factual showing sufficient to establish the existence of a
13 disputed issue of material fact. Taking all of the evidence submitted in the light most favorable
14 to Tario, the Board concludes that Tario has failed to meet his burden on this issue, and that
15 summary judgment should be granted to Baldwin.

16 X.

17 Tario has not submitted any sworn evidence into the record on summary judgment.
18 Further, he has not submitted any statements from an expert to contradict the opinion of
19 Hydrogeologist Peter Willing, Ecology's well drilling coordinator, Trevor Contreras, or B&C
20 Well Drilling & Pump Services, that the alternative proposed by Baldwin is equally protective as
21

1 the 100-foot set back. In the face of the strong evidentiary showing made by Baldwin, Tario
2 cannot rely solely on the allegations contained in his appeal to withstand summary judgment.
3 CR 56(e). *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225-226, 770 P.2d 182, 187 -
4 188 (1989). The Board concludes that although the question before the board is a factual one,
5 Tario has failed to demonstrate that there is a disputed issue of fact, and therefore summary
6 judgment is granted to Baldwin on Issue Number 1. *See Celotex Corp. v. Catrett*, 477 U.S. 317,
7 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (Holding that where there is a complete
8 failure of proof on summary judgment concerning an essential element of the nonmoving party's
9 case, and on which the party bears the burden of proof at trial, there can be no issue as to any
10 material fact).

11 Based on the foregoing analysis, the Board enters the following

12 ORDER

13 Respondent Ecology's summary judgment motion is granted. Issues 2(a) and 3(a) are
14 answered in the negative, and Issues 2(b) and 3(b) are dismissed as beyond the jurisdiction of
15 this Board. Respondent Baldwin's summary judgment motion is granted, and Issue 1 is
16 dismissed. Since there are no remaining issues for hearing, Tario's appeal is dismissed.
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DONE this 2nd day of March 2006.

POLLUTION CONTROL HEARINGS BOARD

William H. Lynch, Chair

Kathleen D. Mix, Member

Kay M. Brown, Presiding
Administrative Appeals Judge